Kuan Him[4]. As referred to earlier the court Order in this case was in effect a direction to the Registrar for the removal of the three caveats and not a direction to register the transfer. Therefore the court Order in this case is a perfectly valid Order but which the Registrar had misconstrued.

Finally, the appellant cannot rely on the protection of section 340 of the National Land Code. True section 340 protects the title or interest of any person registered as proprietor and that it is indefeasible and can be defeated only in one of the three ways mentioned in sub-section (2) of section 340 of the Code. It is to be noticed that the notice of motion referred in its heading to Section 418 of the National Land Code under which provision any person aggrieved by any decision of the Registrar may appeal to the High Court provided that such appeal shall be made within three months beginning with the date the decision was communicated to him.

Section 340 must be read together with the other sections of the Code. Section 418 confers on the applicant a statutory right of appeal. An applicant may appeal against any decision of the Registrar. The word "decision" includes any act, omission, refusal, direction or order of the Registrar – section 418(3).

The appellant cannot claim the protection of Section 340 by the default of the Registrar to observe the statutory prohibition of section 322(2) of the Code.

We will accordingly dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Muthu & Co.; Ho Thian Cheh & Co.*

LAI YEW SEONG v. CHAN KIM SANG

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman and George Seah S.C.JJ.) June 16 & November 8, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 423 of 1985]

Tort – Road accident – Apportionment of liability – Contributory negligence – Duty of driver of vehicle following another – Misdirection both on fact and law – Order of trial court quashed.

In this case the appellant appealed against the apportionment of liability to the extent of one-third against the appellant and two-thirds against the respondent. The contention of the appellant was that the motor accident was caused solely by the negligence of the respondent and the learned Judge was wrong to find that the appellant was also guilty of contributory negligence. The findings of the learned trial judge were as follows –

"I find from the evidence that the car did give trafficator light signal when it was just over one chain away from where it stopped. I found that there were two motor cycles behind the said car, one of the motor cycles eventually passed on the driver's left while the other knocked into the rear off-side of the said car. I found that the last time or the second time the driver looked into the rear-view mirror was when he was about 2 to 3 chains away from the place where he stopped and that he did not look into it again up to the moment of the collision. I found that the car had stopped to let the oncoming lorry pass the car. I further found that the rider had decided to overtake the said car which was slowing down, and not that the driver had applied emergency brake in stopping suddenly, causing and forcing the rider to swerve to his right to overtake to avoid the collision.

I found the rider negligent in overtaking without ensuring whether it was safe to do so, and that he should have seen the oncoming lorry too in view of the insignificant obstruction of the view in front caused by the small size of the said car which was a Toyota Corolla. He further failed to wait to ascertain first the intention of the driver who had switched on his trafficator light signal before deciding to overtake the said car. He was travelling too close to the said car. The next question was, as to whether the driver was himself guilty of any contributory negligence."

Held: (1) negligence as used in the expression "contributory negligence" does not mean breach of duty. It means the failure by a person to use reasonable care for the safety of himself or his property so that he becomes the author of his own wrong. The test of contributory negligence is based entirely on the conduct of the plaintiff in the particular accident or case but the learned judge appeared to have misconstrued the law and applied it wrongly to the defendant;

(2) it is plain that the learned Judge in this case had misdirected himself both on the fact and the law when he was dealing with the respondent's case and contributory negligence. Based on his findings the learned Judge should have found (a) that the respondent was riding his motor-

cycle without keeping any proper lookout (b) that he attempted to overtake the said motor car on the right when it was unsafe to do so and (c) that the cause of the accident was entirely due to his own negligence;

(3) the order of the trial court should be quashed and judgment entered in favour of the appellant.

Cases referred to:

(1) *Lewis* v. *Denye* [1939] 2 K.B. 540, 554.
(2) *Bridge* v. *Grand Junction Ry.* (1838) 150 E.R. 1134.
(3) *R.* v. *Southern Canada Power Co.* [1937] 3 All E.R. 923, 930.
(4) *Nance* v. *British Columbia Electric Ry.* [1951] A.C. 601, 611.
(5) *Brown & Lynn* v. *Western SMT Co. Ltd.* [1945] S.C. 31.
(6) *Ahmad Nordin bin Hj. Maslan & Anor.* v. *Eng Ngak Hua & Ors.* [1985] 2 M.L.J. 431.
(7) *Ramoo* v. *Gan Soo Swee* [1971] 1 M.L.J. 235, 239.
(8) *Chop Seng Heng* v. *Thevannasan & Ors.* [1975] 2 M.L.J. 3, 6.

SUPREME COURT.

Mohamed Nor bin Mohamed for the appellant.

R.K. Nathan for the respondent.

Cur. Adv. Vult.

Seah S.C.J. (delivering the Judgment of the Court): This appeal is limited to the apportionment of liability to the extent of one-third against the appellant and two-thirds against the respondent. The contention of the appellant was that the motor accident was caused solely by the negligence of the respondent and the learned judge was wrong to find that the appellant was also guilty of contributory negligence.

Like most motor accident claims there were conflicting versions and the learned judge after hearing and seeing the plaintiff (respondent in this appeal) and the defendant (the appellant herein) made the following findings at pages 3 and 4 of his Grounds of Judgment:

"I find from the evidence that the car did give trafficator light signal when it was just over one chain away from where it stopped. I found that there were two motor cycles behind the said car, one of the motor cycles eventually passed on the driver's left while the other knocked into the rear off-side of the said car. I found that the last time or the second time the driver looked into the rear-view mirror was when he was about 2 to 3 chains away from the place when he stopped and that he did not look into it again up to the moment of the collision. I found that the car had stopped to let the oncoming lorry pass the car. I further found that the rider had decided to overtake the said car which was slowing down, and not that the driver had applied emergency brake in stopping suddenly, causing and forcing the rider to swerve to his right to overtake to avoid the collision. I found the rider negligent in overtaking without ensuring whether it was safe to do so, and that he should have seen the oncoming lorry too in view of the significant obstruction of the view infront caused by the small size of the said car which was a Toyota Corolla. He further failed to wait to ascertain first the intention of the driver who had switched on his trafficator light signal before deciding to overtake the said car. He was travelling too close to the said car. The next question was, as to whether the driver was himself guilty of any contributory negligence."

We would pause here to deal with the question of contributory negligence. Unless it is properly understood it is apt to be misleading. The expression "contributory negligence" applies mainly to the conduct of the plaintiff. Du Parcq L.J. in *Lewis* v. *Denye*(1) said:

"In order to establish the defence of contributory negligence, the defendant must prove, first, that the plaintiff failed to take 'ordinary care of himself' or, in other words, such care as a reasonable man would take for his own safety, and, secondly, that his failure to take care was a contributory cause of the accident."

The amount of care which the plaintiff may reasonably be expected to take necessarily varies with the circumstances and with the conditions actually prevailing at the material time.

In addition, the word "negligence" is not used in its usual meaning. Negligence ordinarily means breach of a legal duty to take care, but as used in the expression "contributory negligence" it does not mean breach of duty. It means the failure by a person to use reasonable care for the safety of himself or his property, so that he becomes "the author of his own wrong" [see Parke B. in *Bridge* v. *Grand Junction Ry.*(2) and the judgment of Lord Maugham in *R.* v. *Southern Canada Power Co.*(3)]. More recently in *Nance* v. *British Columbia Electric Ry.*(4) Lord Simon said:

"When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed by his want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

The test of contributory negligence, in our judgment, is based entirely on the conduct of the plaintiff in that particular accident or case but the learned judge appeared to have misconstrued the law and applied it wrongly to that of the defendant. Be that as it may, learned counsel had submitted that on the facts as adduced at the trial the respondent/plaintiff had failed to establish, on the

balance of probabilities, that the appellant/defendant was negligent. Dealing with this aspect of the case the learned judge had this to say at pages 4 and 5 of his Grounds of Judgment:

"The driver knew that there were two motor cycles behind him, the nearer one was about 20 to 30 feet away; he wanted to turn right to go to a workshop and at the same time there was an oncoming lorry; in my view, a potentially dangerous situation was being built up and the driver had to keep a very sharp look-out in the circumstances. Despite such situation, he only switched on the right trafficator light signal when he was just over one chain away and not earlier and in this connection, I accepted the passenger's evidence. I did not consider this sufficient warning or warning in time for the rider 20 to 30 feet behind.

Further I found that the circumstances required him, at least, to look at the rear-view mirror once more before he stopped. Further, in view of such a critical situation being built up, I did not think that a conventional signal of trafficator light signal would be sufficient. Such a signal could indicate that the rider behind should be cautious rather than that the driver would be stopping and that the rider should likewise stop, because there was no side road to the right (apart from, presumably a small dirt road, passage way or trodden path to the workshop), in other words, there was no real road junction or cross-roads. In the circumstances it was my considered view that merely switching on the trafficator light signal was not enough, but that an additional hand signal ought to have been given to avoid any confusion to vehicles following behind by indicating that the driver himself was stopping in the middle of the road."

Learned counsel for the appellant launched a four-pronged attack on this part of the judgment of the court. First, it was submitted that this finding was contrary to the case which the respondent attempted to prove in the court below. According to the respondent, he had been following the said motor-car for some distance and to quote his words:

"The car in front stopped suddenly without any indication. I did not know which direction this car wanted to go. Then I wanted to overtake this car from the right and I tried to swerve back to the left (because of the oncoming lorry) but couldn't control it and then the accident took place ... When the car braked to stop, I did not see any brake light or tail light from the car ..."

The respondent's version of how the accident happened was totally rejected by the learned judge.

Secondly, it was contended that observations on the general duty of the driver of a motor vehicle which is following another vehicle have been made in many reported cases. We need only cite one made by Lord Justice-Clerk Cooper in *Brown & Lynn* v. *Western SMT Co. Ltd.*[5]:

"The conduct of the leading driver will, of course, have an important bearing upon liability for an accident in every case in which the conduct of both drivers is put in issue, either by a plea of contributory negligence or by double allegations of fault. But the duty of the following driver is a continuous duty which persists independently of any actual emergency or of the leading driver's reaction to such emergency, and the question whether the following driver has failed in his duty cannot depend upon whether the leading driver has fulfilled his . . . . . The distance which should separate two vehicles travelling one behind the other must depend upon many variable factors – their speed, the nature of the locality, the other traffic present or to be expected, the opportunity available to the following driver of commanding a view ahead of the leading vehicle, the distance within which the following vehicle can be pulled up, and many other things. The following driver is, in my view, bound, so far as reasonably possible, to take up such a position, and to drive in such a fashion, as will enable him to deal successfully with all traffic exigencies reasonably to be anticipated; but whether he has fulfilled this duty must in every case be a question of fact whether, on any emergency disclosing itself, the following driver acted with the alertness, skill and judgment reasonably to be expected in the circumstances . . ."

It was submitted (rightly in our opinion) that the learned judge had failed to take this matter into account and his failure to do so had materially affected the appellant's case and defence against the allegations of the respondent that he was negligent in the handling of his motor-car at the time of the accident.

Thirdly, it was said by learned counsel for the appellant that although passing reference was made to the two motor cyclists who had been following the said motorcar for sometime and that the nearer one was about 20 to 30 feet away, the learned judge did not appear to take into consideration that this motor cyclist managed to pass him safely on the left and why he did so instead of on the right. It was submitted and we agree with his submission, that a reasonable inference to be drawn from this fact was that this particular motor cyclist (who was riding ahead of the respondent) had been keeping a proper lookout and saw the oncoming lorry approaching from the opposite direction on the other side of the road, while the respondent who was riding behind this motor cyclist had apparently failed to do so.

Lastly, learned counsel for the appellant had contended that the learned judge was wrong to rely on the Supreme Court case of *Ahmad Nordin bin Hj. Maslan & Anor.* v. *Eng Ngak Hua & Ors.*[6] to support his view that "merely switching on the trafficator light signal was not enough, but that an additional hand signal ought to have been given to avoid any confusion to vehicles following behind by indicating that the driver himself was stopping in the middle of the road." In our opinion, *Ahmad Nordin* case does not lay down

such a proposition and the principal facts are different from those of the present case. There while travelling along a straight stretch of unlit country road on a dark night the lights of the lorry fully laden with padi suddenly went off and its engine also stalled thereby compelling the driver to park his lorry in the middle of his side of the road with the near-side front and rear tyres about 8 inches away from the left edge of the road and the off-side front and rear tyres about 6 inches from the centre white line. Apart from a triangular reflector placed some 150 feet behind the parked lorry no lights were placed at the rear of the stationary lorry to warn approaching vehicles of its position on the road. A motor-car crashed into the rear of the stationary lorry resulting in the death of the front-seat passenger and injuries to the driver and the rear-seat passengers. On these facts, the Supreme Court held that the mere placing of a triangular reflector by itself was insufficient to forewarn any vehicle of the danger that lies ahead in the darkness having regard to the provision contained in paragraph 42 of the Highway Code relating to the need to display an emergency light when the lights of the vehicle fails. Here, the accident happened in broad daylight and fine weather. *Ahmad Nordin* case can therefore be distinguished from the present case. There was no dispute about visibility and there was nothing to obstruct the view of the respondent that lay in front of him. His main complaint against the appellant was that he stopped his motor-car suddenly in the middle of the road without giving any prior trafficator light signal of his intention to turn to the right. This allegation was rejected by the learned judge. It was not the case of the respondent in the court below that if the appellant had given a hand signal indicating his intention to stop, he could have avoided the accident. The short answer to this is that if the first motor cyclist, who was riding slightly ahead of the respondent, could pass the motor-car safely on the left why the respondent, who was riding behind him, could not do so?

Learned counsel for the appellant then submitted that the learned judge ought to have decided the suit based on the case put up by the respondent in the court below. Having disbelieved the respondent's allegations that the appellant stopped his motor-car suddenly without any prior warnings whatsoever, it was argued that the learned judge ought to have dismissed the claim of the respondent based on the negligence of the appellant, since the learned judge apparently had accepted substantially the testimony of the appellant and his witness. It was further contended that until the respondent had established the appellant was guilty of negligence there was no need for the learned judge to consider the conduct of the appellant in dealing with the question of contributory negligence. Learned counsel submitted that the law on contributory negligence does not concern with the conduct of the defendant; it deals with the conduct of the plaintiff only. We agree with all these submissions.

In *Ramoo* v. *Gan Soo Swee*[7] Lord Cross in giving the judgment of the Privy Council said:

> "Their Lordships are not sure that had they been trying the case they would in all circumstances have attributed so much of the blame to the lorry driver but it is only in exceptional circumstances that an appellate court is justified in interfering with an apportionment of liability made by the trial judge (see *The Macgregor* [1943] A.C. 197) and such circumstances do not exist here.
>
> Accordingly their Lordships direct that the judgment of the Federal Court be set aside and that of Buttrose J. restored and that the respondents pay the costs incurred by the appellant before the Federal Court and their appeal to the Board."

In the High Court, Buttrose J. found that the traffic lights were defective but held that the respective taxi and lorry drivers were aware of this. He apportioned the blame at 75% on the lorry driver and 25% on the taxi driver.

The Federal Court setting aside the finding of Buttrose J. held that there was no evidence that either the driver of the lorry or the taxi knew that the traffic lights were defective and that in the circumstances the plaintiff had failed to prove that either or both the drivers were negligent.

Dealing with an appeal on apportionment in the case of *Chop Seng Heng* v. *Thevannasan & Ors.*[8] Lord Edmund-Davies said:

> "Submissions that the trial judge misdirected himself when apportioning the blame as he did are, in their Lordships' judgment, ill-founded. This case is, accordingly, unlike *Kerry* v. *Carter* [1969] 1 W.L.R. 1372, where, in a personal injuries case, the Court of Appeal interfered with the trial judge's apportionment on the ground that he had substantially misdirected himself on matters of fact.
>
> There being no misdirection in the present case, whether or not their Lordships would have apportioned the blame in the manner as did the trial judge is neither here nor there. No error in principle has been established and, applying *The Macgregor (supra)* their Lordships would accordingly restore the 75:25 apportionment arrived at by Suffian F.J."

Applying this to the facts of the present case, it is plain that the learned judge had misdirected himself both on the fact and the law when he was

dealing with the respondent's case and contributory negligence. Based on his findings the learned judge should have held that (a) that the respondent was riding his motor-cycle without keeping any proper lookout, (b) that he attempted to overtake the said motor-car on the right when it was unsafe to do so and (c) that the cause of the accident was due entirely to his own negligence. Not only would we set aside the apportionment of one-third blame attributed to the appellant and two-thirds to the respondent, we would also quash the whole of the Court Order and enter judgment in favour of the appellant and direct that the claim of the respondent against the appellant be dismissed. For the above reasons, the appeal is allowed with costs to the appellants here and below to be taxed. The deposit of $500/– to be refunded to the appellant forthwith.

Appeal allowed.

Solicitors: *Wong Chooi & Mohd. Nor.; R.K. Nathan & Co.*

VEETAK ENTERPRISE SDN. BHD. v. THE KUALA LUMPUR FINANCE BHD.

[O.C.J. (Gunn Chit Tuan J.) January 18 & 21; February 15, 1985]

[Kuala Lumpur – Civil Suit No. C2375 of 1984]

Practice and Procedure – Application to strike out plaintiff's action – Whether frivolous or vexatious and an abuse of the process of the court – Pleadings to be struck out only in plain and obvious cases – Not permissible to try action on affidavits when facts and issues are in dispute – R.H.C. 1980, O.18 r.19.

In this application under Order 18, rule 19(1)(a), (b) and (d) of the Rules of the High Court 1980, the defendant asked for an order that the action by the plaintiff for damages by reason of acts of conversion alleged to be committed by the defendant in respect of the issue of certain documents of title to the land be dismissed on the ground that the action discloses no reasonable cause of action, was frivolous or vexatious and an abuse of the process of court.

The defendant/applicant contended that the plaintiff had no lawful cause of action against the defendant, that the plaintiff was now estopped by record on the principle of *res judicata* from raising an issue in the present action which it could but did not raise in the former action, and that in the present action the plaintiff could not be permitted to set up its own fraudulent or illegal act in support of its claim. The plaintiff contended that the powers under Order 18 rule 19 of the Rules of the High Court 1980, ought not to be exercised if the plaintiff may have a cause of action with some chance of success when only the allegations in the pleadings were considered. The plaintiff argued that the defendant could not raise the issue of estoppel and that on the issue of *res judicata* it was argued that the pleadings would only be struck out in plain and obvious cases.

Held: (1) the law concerning the exercise of powers under Order 18 rule 19 is clear and settled. It is only in plain and obvious cases that recourse can be had to the summary process under that rule, and if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under Order 33, rule 2;

(2) on an application to strike out the statement of claim and to dismiss the action, it is not permissible to try the action on affidavits when the facts and issues are in dispute;

(3) in all the circumstances of this case, the plaintiff's claim was not frivolous, vexatious and an abuse of the court's process. Accordingly the plaintiff's action ought not to be dismissed summarily under Order 18, rule 19 of the Rules of the High Court 1980.

Cases referred to:

(1) *Khan* v. *Goleccha International Ltd.* [1980] 2 All E.R. 259, 264.
(2) *Othman & Anor.* v. *Mek* [1971] 2 M.L.J. 214, 216.
(3) *Henderson* v. *Henderson* [1843-1860] All E.R. Rep. 378.
(4) *Hoystead & Ors.* v. *Taxation Commissioner* [1925] All E.R. 56, 64.
(5) *Kesarmal & Anor.* v. *Valliappa Chettiar & Anor.* [1954] M.L.J. 179.
(6) *Kan Tak Fee & 2 Ors.* v. *Au Phin Yean* [1934] M.L.J. 94, 95.
(7) *Tractors Malaysia Bhd.* v. *Tio Chee Hing* [1975] 2 M.L.J. 1.
(8) *Dressy Frocks Pty. Ltd.* v. *Bock* [1951] N.S.W.R. 390.
(9) *Selangor United Rubber Estates Ltd.* v. *Cradock (a bankrupt) & Ors. (No. 3)* [1968] 2 All E.R. 1073, 1150.
(10) *Puran Singh* v. *Kehar Singh & Anor.* [1939] M.L.J. 71, 75.
(11) *Barrow's case* (1880) 14 Ch. D. 432.
(12) *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.* [1964] M.L.J. 49.
(13) *Loh Holdings Sdn. Bhd.* v. *Peglin Development Sdn. Bhd. & Anor.* [1984] 2 M.L.J. 105, 113.
(14) *Brisbane City Council* v. *Attorney-General* [1979] A.C. 411, 425.
(15) *Evans* v. *Bartlam* [1937] A.C. 473.
(16) *Hubbuck* v. *Wilkinson* [1899] 1 Q.B. 86, 91.
(17) *Wenlock* v. *Moloney* [1965] 1 W.L.R. 1238; [1965] 2 All E.R. 871 C.A.
(18) *Heald & Anor.* v. *O'Connor* [1971] 2 All E.R. 1105.
(19) *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.* [1962] M.L.J. 35.